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OPINION COMMITTEE



TEXAS DEPARTMENT OF AGRICULTURE
COMMISSIONER SID MILLER

October 23, 2017

The Honorable Ken Paxton
Office of the Attorney General
Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-48233-17
48233
RD-0189-KP

RE: Implementation of H.B. 2029, 85th Legislature, Regular Session, 2017; interpretation of the phrase "food sold for immediate consumption"

Via email to opinion.committee@oag.texas.gov

Dear Attorney General Paxton:

The Texas Department of Agriculture (Department) requests an opinion from your office regarding the rules adopted by the Department as part of the Department's implementation of H.B. 2029, 85th Legislature, Regular Session, 2017 (HB 2029). Specifically, the Department requests an opinion on the following question:

Are the Department's rules adopted in implementation of HB 2029, 4 TAC §§ 12.1(8), 12.1(10) and 12.13(c)(5), in direct conflict with the clear and unambiguous language of the statute, and the author's and sponsor's intent of the bill?

Background

The Governor signed HB 2029 on June 1, 2017, and the legislation took effect September 1, 2017. The Act added Section 13.1002 to the Agriculture Code and states:

Sec. 13.1002. EXEMPTION OF CERTAIN WEIGHING OR MEASURING DEVICES. Notwithstanding any other law, a commercial weighing or measuring device that is exclusively used to weigh food sold for immediate consumption is exempt from this subchapter, including the inspection requirements under Section 13.101 and the registration requirements under Section 13.1011.

In implementation of the bill, the Department proposed new subsections (8) and (10) to Title 4, Part 1, Chapter 12, Subchapter A, Section 12.1 of the Texas Administrative Code, along with new subsection (c) to Title 4, Part 1, Chapter 12, Subchapter B, Section 12.13. The rule proposal was published in the Texas Register on July 7, 2017, at 42 Tex. Reg. 3455. The Department did not receive any comments in favor of or against the proposal before the end of the comment period, and filed the rules for adoption on August 7, 2017, with an effective date of August 27, 2017¹.

¹ 42 Tex. Reg. 4123.

New 4 TAC § 12.1(8) adds the following definition of "Food for Immediate Consumption":

Food for Immediate Consumption – Food or meals prepared, served or sold by restaurants, lunch counters or cafeterias that when sold requires no further preparation by the purchaser prior to consumption on the premises, except for:

- (a) refrigerated food that is typically reheated prior to eating;*
- (b) sliced luncheon products such a meat, poultry or cheese when sold separately;*
- (c) food that is cut, repackaged or pasteurized by the seller; or*
- (d) fruits and Vegetables.*

New 4 TAC § 12.1(10) defines *Immediate Consumption Food Scales* as *A scale exclusively used to weigh food sold for immediate consumption on premises.* New 4 TAC 12.13(c)(5) exempts *immediate consumption food scales* from registration and inspection requirements as follows:

(c) The following devices are exempt from Registration and Inspection requirements under §13.1002 of the Texas Agriculture Code; as authorized by §13.029 of the Texas Agriculture Code:

(5) immediate consumption food scales.

On September 18, 2017, the Texas Restaurant Association (TRA) corresponded with the Department and requested reconsideration of 4 TAC §§ 12.1(8), 12.1(10), and 12.13(c)(5). TRA stated that the rules were in direct conflict with the clear and unambiguous language of the statute, and the author's and sponsor's intent of the bill. Additionally, TRA said that inclusion of the term "on the premises" in Section 12.1(8) was not supported by the statute, legislative intent, or committee testimony. In the letter, TRA proposed substitute language for subsections 12.1(8), 12.1(10) and 12.13. In support of its substitute language, TRA stated the that the term and meaning of "food sold for immediate consumption" more closely tracked Tax Code Section 151.314(c-2), and that is what the food service industry knows and has operated under for a long time.

On October 17, 2017, the Department received correspondence from the Honorable Charles Perry, who was the Senate sponsor of the bill. The letter is cosigned by the Honorable J.M. Lozano, HB 2029's author, along with 18 other Texas senators and 25 house members. In the letter, Senator Perry and Representative Lozano request that the Department revise its rules, and in support of this request, state that the Department's rules implementing HB 2029 go beyond the legislation's original intent by only exempting devices at food establishments where food is sold for immediate consumption.

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The Department has attached a copy of TRA's September 18, 2017 correspondence, and Senator Perry's October 17, 2017 correspondence, to this request for opinion.

Analysis – Applicability of Section 151.314(c-2) of the Tax Code

On March 20, 2017, Representative Lozano testified before the House Licensing and Administrative Procedures Committee. Among other things, Representative Lozano testified that "immediate consumption is most easily defined as food subject to tax under the tax code." Accordingly, before drafting and proposing 4 TAC §§ 12.1(8), 12.1(10) and 12.13(c)(5) for consideration, the Department reviewed the pertinent sections of the Tax Code, along with the regulations adopted by the Comptroller of Public Accounts to implement the statute.

Section 153.314(c-2) of the Tax Code does not contain definitions of the phrases "food sold for immediate consumption" or "immediate consumption," and thus, the Department was unable to cross reference a particular section or subsection in the statute and incorporate it into its rules. Also, the Department found the sales and use tax provisions and implementing regulations to be complex and inapposite to the Department's regulation of weights and measures devices.

Section 151.314(a) of the Tax Code exempts food products for human consumption from state sales or use taxes. Section 151.314(c-2) then removes certain "prepared food" from the exemption, thus subjecting those food items to state sales and use taxes, as follows:

(c-2) The exemption provided by Subsection (a) does not include the following prepared food:

(1) food, food products, and drinks, including meals, milk and milk products, fruit and fruit products, sandwiches, salads, processed meats and seafoods, vegetable juice, and ice cream in cones or small cups, served, prepared, or sold ready for immediate consumption by restaurants, lunch counters, cafeterias, delis, vending machines, hotels, or like places of business or sold ready for immediate consumption from pushcarts, motor vehicles or any other form of vehicle;

(2) food sold in a heated state by the seller; or

(3) two or more food ingredients mixed or combined by the seller for sale as a single item, including items that are sold in an unheated state by weight or volume as a single item, but not including food that is only cut, repackaged, or pasteurized. (underline added.)

The introduction of the term "prepared food," which is used in the Tax Code, would add an unnecessarily complex element to the Department's regulation of weights and measures devices. Also, while Section 151.314(c-2)(1) references certain food items that are "sold ready for immediate consumption," the list includes items that are not customarily sold by weight, such as sandwiches and ice cream in cones or small cups, and specifies places where a consumer would

not customarily expect to purchase food by weight, such as vending machines, push carts and vehicles. Despite the lack of similarity between the Tax Code and the Department's regulation of weights and measures under Chapter 13 of the Agriculture, the Department did model its definition of "food for immediate consumption" to conform, as much as possible, to that section, which can be seen by comparing 4 TAC § 12.1(8) with Section 151.314(c-2) and the Comptroller's definition of "food ready for immediate consumption" in 34 TAC § 3.293(a)(7).

By proposing substitute language for 4 TAC §§ 12.1(8) and (10) on page two of its letter, TRA, like the Department, appears to perceive that the Tax Code in general, and Section 151.314(c-2) in particular, do not readily relate to the Department's regulation of weights and measures devices, and thus do not offer a simple solution to defining the phrases "food for immediate consumption" and "immediate consumption food scales."

Analysis – Adoption of Implementing Regulations

Following passage of HB 2029, the Department drafted rules to implement the legislature's exemption of a "commercial weighing or measuring device that is exclusively used to weigh food sold for immediate consumption" from Chapter 13, Subchapter C, of the Agriculture Code, pertaining to inspection and weighing of measuring devices².

The Agriculture Code does not define "food sold for immediate consumption." The Department adopted 4 TAC §§ 12.1(8), 12.1(10) and 12.13(c)(5) so that industry and the public could readily identify the scales that continue to be regulated under Chapter 13, Subchapter C of the Agriculture Code, and the scales that are exempt. In doing so, the Department was guided by Section 311.011(a) of the Government Code, which states that in the construction of a statute, "Words and phrases shall be read in context and construed according to the rules of grammar and common usage." Also, the Department was informed by Section 311.021(5) of the Government Code, which provides that in enacting a statute, "public interest is favored over any private interest." The Department was further informed by consistent direction from the Texas Supreme Court that it is "a fair assumption that the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent." *Leland v. Brandal*, 257 S.W. 3d 204, 206 (Tex. 2008) (citing *Fitzgerald v. Advanced Spine Fixation Systems, Inc.*, 996 S.W. 2d 864, 866 (Tex. 1999)). If the statute's language is unambiguous, its plain meaning shall prevail. *Id.* (citing *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003)). The Department acknowledges that the meaning of HB 2029 is clear -- a commercial weighing or measuring device that is exclusively used to weigh food sold for immediate consumption is exempt from Chapter 13, Subchapter C of the Agriculture Code. Since the legislature did not define the phrase "food sold for immediate consumption," it was up to the Department to do so, guided by the pertinent provisions of the Code Construction Act. Although the Department has given careful and respectful consideration to Senator Perry and Representative Lozano's correspondence, precedent from the Texas Supreme Court tells us that "legislative intent" as expressed in the October 17, 2017 letter is not relevant to the inquiry here. The omission of a

² Section 12.016 of the Agriculture Code gives the Department authority to adopt rules as necessary for the administration of its powers and duties under the code.

statutory definition for "food sold for immediate consumption" does not make the statute ambiguous. There is no reason to consider "legislative intent" unless the statute is ambiguous.

Merriam-Webster's Dictionary defines *immediate*³ as, among other things:

1.a: acting or being without the intervention of another object, cause, or agency;

4.a: occurring, acting, or accomplished without loss or interval of time; and

4.b(1): near to or related to the present.

1.a, 4.a and 4.b(1) above define "immediate" in terms of passage of time, without the intervention of another object, cause or agency, without loss or interval of time, and near to or related to the present.

TDA added the phrase "on the premises" to the definition of "food for immediate consumption" in 4 TAC § 12.1(8) and the phrase "on premises" to the definition of "immediate consumption food scales" in 4 TAC § 12.1(10) to account for "take out" food that is purchased for consumption after leaving the restaurant. Clearly, under the dictionary definitions above, food taken out of the restaurant and consumed after leaving the restaurant is not "food sold for immediate consumption," in that:

- there has been the intervention of another object, cause or agency – food has been packaged to go and taken out the restaurant;
- there has been a loss or interval of time – food has been removed from the restaurant and will be consumed after the purchaser leaves the restaurant; and
- consumption of the food is no longer near to or related to the present.

TRA's construction of "food sold for immediate consumption" is contrary to Section 311.011(a) of the Government Code, in that it does not follow common usage, as reflected by Merriam-Webster's Dictionary. Additionally, TRA's construction puts the private interest of restaurants above the general public interest by expanding the HB 2029 exemption to ". . . hotels, delis, mobile vendors, or other like places of business," and to all food sold by such businesses, provided the food does not require further preparation by the purchaser prior to consumption.

Subchapter C, Chapter 13 of the Agriculture Code establishes a strong public policy in favor of accurate weights and measures by requiring all commercial weighing or measuring devices⁴ to be registered with the department⁵, and by requiring inspection of such devices every four

³ "Immediate." Merriam-Webster.com. Accessed October 12, 2017. <https://www.merriam-webster.com/dictionary/immediate>.

⁴ Section 13.001 of the Agriculture Code defines a "commercial weighing or measuring device" as a weighing or measuring device used in a commercial transaction.

⁵ Section 13.1011 of the Agriculture Code.

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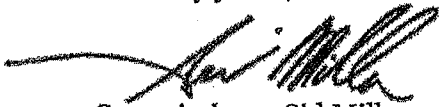
years⁶, or upon reasonable belief that an unregistered device is being used for a commercial transaction⁷, unless a device is specifically exempted by law. In view of this strong legislative policy, the Department declines to adopt an expansive definition of food sold for immediate consumption that will substantially lessen consumer protection.

Summary and Request for Attorney General Opinion

The Department is of the opinion that it lawfully adopted its rules implementing HB 2029, giving appropriate consideration to Section 151.314(c-2) of the Tax Code and following the directives in the Code Construction Act, Chapter 311 of the Government Code. Nevertheless, the Department takes very seriously Senator Perry and Representative Lozano's declaration that the Department's rules go beyond the legislation's original intent, and TRA's assertions that 4 TAC §§ 12.1(8), 12.1(10) and 12.13(c)(5) are in direct conflict with the clear and unambiguous language of HB 2029, and the author's and sponsor's intent of the bill.

In order to clarify the Department's rights, responsibilities, and duties with respect to this matter, the Department seeks an opinion from your office on whether 4 TAC §§ 12.1(8), 12.1(10) and 12.13(c)(5), are in direct conflict with the clear and unambiguous language of HB 2029, and the author's and sponsor's intent of the bill.

Sincerely yours,



Commissioner Sid Miller
Texas Department of Agriculture

SM/TK/spd

⁶ Section 13.101 of the Agriculture Code.

⁷ Section 13.1001 of the Agriculture Code.